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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 794

O. A. CARGILL, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner, O. A. Cargill, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of conviction on Count Three of petitioner's indictment for perjury in the United States District Court for the Western District of Oklahoma.

## OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported, but is reported in part at 36 U.S. LAW WEEK 2142 (Aug. 11, 1967), and is printed in the Appendix to this petition (App. 1a-9a).

## JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1967 (App. 10a). Petition for rehearing was denied on September 7, 1967 (App. 10a). On September 27, 1967, Justice White entered an order extending the time for filing a petition for certiorari to and including November 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. (a) What should be the test of harmless error for violations of the rule of *Dennis* v. *United States*, 384 U.S. 855 (1966); is it the same as the test of harmless error for violations of the Jencks Act, 18 U.S.C. § 3500?

(b) Under any acceptable test, was the error harmless in this case?

2. (a) Whether a prospective defendant may be compelled to appear under subpoena before a federal grand jury, and if so, whether he must be advised of his status as a prospective defendant, his privilege against self-incrimination and his right to counsel.

(b) Whether a perjury charge may be founded upon exculpatory denials before a federal grand jury by a prospective defendant, when the government has compelled him to testify under subpoena, not advised him of his status as a prospective defendant nor of his Fifth and Sixth Amendment rights, and sworn him to secrecy by an illegal oath in violation of Rule 6(e), F.R.Crim.P.

3. Whether the rule of *Delaney* v. *United States*, 199 F.2d 107 (1st Cir. 1952), that prejudicial publicity generated against a federal criminal defendant by a

legitimate federal legislative proceeding entitles the defendant to a continuance, applies to prejudicial publicity generated against a federal criminal defendant by a state legislative proceeding.

## STATEMENT

This case is an outgrowth of what the court below called "the Oklahoma Supreme Court bribery scandal" (App. 2a).

Petitioner, O. A. Cargill, was indicted on February 15, 1965, in three counts, charging him with commission of perjury on April 7, 1964, before the Grand Jury of the United States District Court for the Western District of Oklahoma. (R. 14-17.)[1] The indictment was 11 days before petitioner's eightieth birthday (R. 1137); petitioner had practiced law in Oklahoma City for half a century, and during the 1920's had served as Mayor of Oklahoma City (R. 1139).

### The Indictment

The three counts of the indictment alleged in substance that Cargill had lied to the Grand Jury in denying knowledge of and participation in payments of bribes to Justices of the Oklahoma Supreme Court.

Count One charged that Cargill falsely denied knowing what happened to $150,000 withdrawn by his former client, a Mr. Hugh A. Carroll, from the Selected Investments Corporation of which Carroll was President. In fact, the count alleged, Cargill knew that the $150,000

[1] Record references are to the printed Transcript of Record in the Court of Appeals, unless otherwise indicated.

was a payment by Carroll to former Oklahoma Supreme Court Justice N. S. Corn

> "to obtain a favorable ruling in the case of Selected Investments Corporation vs. Oklahoma Tax Commission . . . and Cargill had in fact received a portion of the aforesaid sum of money . . . ." (R. 14-15.)

Count Two charged that Cargill falsely denied prior knowledge of the "story" that Carroll recited in a federal bankruptcy proceeding, that Carroll had given the $150,000 to "Pierre Laval". In fact, Count Two alleged, Cargill created "the Pierre Laval story". (R. 15-16.)

Count Three charged that Cargill falsely denied that he "ever had any financial transactions with any Justices of the Oklahoma Supreme Court". (R. 16-17.) All of the "financial transactions" relied upon were with Justice Corn. (See R. 1290-91.) One of the transactions alleged in Count Three was that:

> "Cargill did, in at least one instance, receive money from one member of the Oklahoma Supreme Court for the express purpose of influencing the vote of another member of that Body." (R. 17.)

**The Prior Grand Jury Proceedings**

Petitioner had appeared under subpoena on April 7, 1964, before the grand jury which subsequently indicted him. (R. 310, 1437.) On the preceding day, April 6, 1964, the grand jury had heard testimony by Carroll. The minutes of Carroll's grand jury testimony have not been disclosed (which the court of appeals held error, App. 7a); but according to Carroll's trial testimony, his prior grand jury testimony covered the same ground. Thus, at the time of petitioner's

compelled grand jury appearance, he was already implicated by Carroll's prior testimony that the petitioner had told Carroll to lie to the federal bankruptcy court about the $150,000. (See R. 402-03; R. 352-54.)

Petitioner concededly was not advised of his status as a prospective defendant, nor of any rights that he might have under the Fifth and Sixth Amendments or otherwise, prior to giving his grand jury testimony. (R. 316-17.) The subpoena addressed to petitioner did not recite the subject matter of the grand jury's investigation. It stated that it was "issued on application of the United States". (R. 1437.)

At trial, it was disclosed that the grand jury investigation was being conducted by Justice Department attorneys pursuant to a letter of authorization from Deputy Attorney General Katzenbach, on the basis of information "that there have occurred and are occurring, in said Western District of Oklahoma . . . violations of the internal revenue laws of the United States, as well as violations of the perjury, bribery and other criminal laws of the United States and conspiracy to commit all such offenses." (R. 1420.) On April 8, 1964, the grand jury indicted Oklahoma Supreme Court Justices Corn and Welch for income tax violations (R. 335), presumably on the basis of unreported income from alleged bribes (see R. 328-29).

**Trial Testimony**

At trial the two principal witnesses against petitioner were Carroll and Corn. By the time of trial, Carroll had served a federal sentence for mail and securities fraud and Corn a sentence for income tax evasion. (R. 436, 516.) Each had been granted immunity from further federal or state prosecution. (App. 2a.)

Carroll testified that he had, while President of Selected Investments Corporation, withdrawn $200,000 from the Corporation and placed it in his own bank account. He had paid $150,000 of this sum to Justice Corn in order to obtain a favorable decision on an appeal by Selected Investments Corporation from a State tax assessment against the Corporation potentially involving $560,000. After reversal of the assessment on appeal Carroll delivered the $150,000 to Corn in cash installments of $25,000 and $125,000, the latter amount having been delivered to Carroll's office from Carroll's bank by a Brink's guard. Carroll returned the remaining $50,000 to the Corporation. (R. 341-47.)

Subsequently, Selected Investments Corporation was the subject of a federal bankruptcy proceeding in the United States District Court for the Western District of Oklahoma. Carroll testified that, shortly before the federal bankruptcy hearing, he had gone to petitioner's home and told him of the $150,000 payment to Judge Corn. (R. 351-52.) To which he said petitioner responded:

> ". . . he wished he had known about it, he could have handled it for less.
>
> (Laughter in the court room)" (R. 352.)

Carroll testified that petitioner had suggested that they make up a story for Carroll to tell the bankruptcy court: a story that Carroll had given the $150,000 to a "Pierre Laval, who was supposed to be a broker from Montreal, Canada", in connection with an oil transaction. (R. 352-53.) Carroll told the Pierre Laval story under oath at the federal bankruptcy hearing on March 17, 1958, while Cargill was present in the courtroom as Carroll's lawyer. (R. 354.)

Corn testified that he had had "financial transactions" with petitioner in four matters. (R. 506.) One was an alleged agreement for regular contributions to Corn's re-election campaigns, in return for a promise by Corn to vote on Cargill's side "as a sixth man" in cases where Cargill already had a majority of the nine-member Oklahoma Supreme Court in his favor (R. 504-06). Corn's three "other financial transactions" with petitioner were on three specified Oklahoma Supreme Court cases. In two of these, petitioner allegedly paid Corn a bribe. (R. 506-10, 513-15.)

The other "transaction" was in the Selected Investments case, about which Carroll had testified. Corn testified that, after receiving a promise of $150,000 from Carroll if he could get the case reversed, Corn called petitioner, "told him the deal I had with Carroll, that I would give him $2500 if he would get [Justice] Carlisle to vote for the opinion." (R. 510.) Petitioner allegedly agreed and subsequently informed Corn that "he had taken it up with Carlisle and . . . I could depend on his vote." (R. 510.) Corn later paid Cargill $2500 of the amount Corn had received from Carroll. (R. 511.) Corn also testified (though Carroll had not) that Corn had told Carroll to hire Cargill as Carroll's attorney in the federal bankruptcy case. (R. 511-512.) Corn then had learned from Cargill, prior to Carroll's testifying at the bankruptcy hearing, of the false story that Carroll would tell. (R. 512-513.) Corn also testified that, when petitioner refused to help him during the investigation of Corn by Internal Revenue, Corn threatened to expose the $2500 transaction with Cargill in the Selected Investments case and the bribes in the other two cases; which had produced an angry response from petitioner. (R. 515-16.)

Petitioner, testifying in his own defense, denied any prior knowledge of the perjurious testimony given by Carroll in the federal bankruptcy proceeding, denied receipt of the $2500 from Corn in the Selected Investments Corporation case, and denied the two alleged bribes to Corn and the alleged "sixth man" agreement. (R. 1137-1236.) Numerous fact witnesses and character witnesses testified in support of petitioner's defense, including seven Oklahoma Supreme Court Justices and one former Justice who testified that they had never been offered consideration by or had "financial transactions" with petitioner. (R. 977-1137, 1193-95.) The jury, after deliberating from 3:30 p.m. to 1:00 in the morning, returned a verdict of guilty on all three counts. (R. 1370, 1374.) Petitioner was sentenced to five years' imprisonment on each count, to run concurrently, and to a $1,000 fine on each count. (R. 136.)

**Reversal of Two Counts on Appeal**

The court of appeals reversed the conviction on Counts One and Two because of the trial court's denial of petitioner's request, at the conclusion of Carroll's direct examination, for production of the minutes of Carroll's grand jury testimony. The court held that:

> "Under the record in the case before us, *as to Counts I and II,* the appellant has brought himself within the Supreme Court's decision in *Dennis* v. *United States, supra,* as to his trial request for the transcript of the testimony of Carroll. We hold that it was error for the court not to have complied with the request. * * * [T]he trial court did not have the benefit of the Supreme Court's opinion when it acted. * * * The case before us concerns a specific and clear request for a transcript of a named witness's grand jury tes-

timony needed for his cross-examination, and we decide that it should have been produced for such a purpose." (App. 5a-7a; emphasis supplied.)

However, the court of appeals did not reverse the conviction on Count Three, to which Carroll's testimony also related. Nor did the opinion state reasons for failing to do so. (See n. 2, *infra.*)

**Prejudicial Publicity**

The court of appeals' opinion is likewise silent on the issue of prejudicial publicity, strongly pressed by petitioner in both courts below. Needless to say, "the Oklahoma Supreme Court bribery scandal" (App. 2a) evoked great publicity. Ten volumes of newspaper clippings, submitted to and considered by the trial court, are contained in the Record forwarded here. (See R. 1523.) Petitioner's motions prior to trial and at commencement of trial for a continuance because of this publicity were denied. (R. 68, 1523.)

The publicity most prejudicial to petitioner stemmed in large part from actions in the Oklahoma Legislature: (1) a speech some three weeks before return of petitioner's indictment by the Republican floor leader (now the State's Attorney General) quoting from and referring to the statement given by former Justice Corn to the United States Attorney, albeit substituting the name of "Mr. X" for petitioner's in Corn's account; (2) ensuing hearings by the Investigating Committee of the State Legislature; (3) the impeachment trial of Justice Johnson, televised in part, held by the Legislature on the eve of petitioner's trial, and including testimony by Carroll and Corn, the two principal prosecution witnesses at petitioner's trial. (R. 41-49; Exs. I through X.)

## REASONS FOR GRANTING THE WRIT

1. This Court's decision in *Dennis* v. *United States,* 384 U.S. 855 (1966), established a rule for production of the minutes of the grand jury testimony of a government witness, for purposes of cross-examination at trial. The *Dennis* rule is analogous to the rule for production of other pretrial statements of the witness established in *Jencks* v. *United States,* 353 U.S. 657 (1957), and codified in the Jencks Act, 18 U.S.C. § 3500.

Under the *Dennis* rule, as under the Jencks Act, questions will inevitably arise as to whether the erroneous denial of materials properly requested for cross-examination is reversible or harmless error. This Court should therefore determine, early in the life of the *Dennis* rule, what test of harmless error is to apply, and whether this test should be the same as that adopted under the Jencks Act.

An early determination is important because, as experience under the Jencks Act has shown, erroneous denials can be expected to arise more frequently in the years before trial courts and counsel became thoroughly familiar with the rule and its application. Moreover, there are probably a substantial number of cases currently on appeal which, like the instant case, were tried prior to the *Dennis* decision. Erroneous denial of requests for grand jury minutes in these cases necessarily raises questions of harmless error.

Under the Jencks Act, the test of harmless error applied by this Court is whether the defendant at trial received "the same information", "the very same information" that was contained in the erroneously withheld impeachment material. *Rosenberg* v. *United States,* 360 U.S. 367, 370-71 (1959). The *Rosenberg*

test was reiterated and followed in *Killian* v. *United States*, 368 U.S. 231, 243-44 (1961). Four members of the Court in *Rosenberg* described the appropriate standard of harmless error as "very strict", 360 U.S. at 376 (dissenting opinion); and Judge Friendly has observed that the majority seems to have agreed on the strictness of the standard though not on its application in the particular case. See *Kyle* v. *United States*, 297 F.2d 507, 514 (2d Cir. 1961). Since *Dennis* relied on the *Jencks* rationale (see App. 5a), and both rules are similar in purpose and effect, a like test of harmless error seems appropriate. If anything the *Dennis* test should be stricter, since sworn verbatim testimony tends to have greater impeachment value than many types of non-verbatim statements producible under the Jencks Act.

The decision below did not purport to apply the *Rosenberg* standard of harmless error, or indeed any other recognized standard. It states no reason for its failure to reverse the conviction on Count Three because of the erroneous denial of Carroll's grand jury testimony.[2] Plainly, the court did not consider the minutes useless for impeachment purposes, or duplicative of other impeachment material produced, since it

[2] After beginning its discussion of Count Three, the opinion below states:

> "The appeal on this point does not involve the production of transcripts of testimony given before the grand jury considered above." (App. 8a.)

No explanation for this assertion is given. The Appellant in his brief below had sought a new trial on the *Dennis* point, and did not in any way limit his request to retrial of the first two counts. (Brief of Appellant, pp. 19, 27-28.) Nor would Appellant have had any conceivable reason for such a limitation, since he faced concurrent five-year prison sentences on each of the three counts.

reversed two counts on the ground that these minutes had been denied.

Petitioner submits that either under the *Rosenberg* standard or any reasonable alternative standard which the government may advocate, the violation of the *Dennis* rule should not be deemed harmless here. Even if Carroll's testimony had not related to Count Three (and it did), the verdict on Count Three would have been seriously affected by deprivation of the opportunity to impeach Carroll. Unlike *Rosenberg*, where the witness whose statement was withheld had not implicated the petitioner in her testimony (see 360 U.S. at 373-74), Carroll was a principal witness. The essential issue at the trial was whether the jury believed petitioner, or whether it believed Carroll and Corn. The latter two had been friends for decades (R. 377, 535-36), were each convicted felons, and in return for testifying had received from the Solicitor General and Acting Attorney General written assurances that they need not fear further prosecution for offenses relating to the subject matter of their expected testimony. (R. 1435-36, 1512-13.) If the jury believed that Cargill was lying in denying Carroll's testimony, it would naturally be prone to conclude that he was also lying in denying Corn's. Since the court of appeals recognized that the deprivation of the opportunity to impeach Carroll had harmed petitioner on Counts One and Two, deprivation of this opportunity must likewise have affected the jury's evaluation of Cargill's credibility in denying the charges of Count Three.[8]

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[8] Here, unlike *Roberts LaVallee*, 2 Cr. L 3011 (No. 193 Misc., Oct, 23, 1967), where a preliminary hearing transcript of witnesses' testimony had been denied, the petitioner was not present when the pretrial testimony was given. Thus he is not "in a position to know what it [the transcript] contains." 2 Cr. L at 3012 (dissenting opinion).

In fact, the allegations of the three counts were closely related. The Carroll-Corn bribe transaction related to all three counts, and essentially the same allegation—that Cargill had received a portion of the bribe money ($2,500)—appears both in Count One and Count Three. Cargill's alleged receipt from Corn of $2,500 of the $150,000 that Corn had received from Carroll, was both a "financial transaction" with a Justice as charged in Count Three,[4] and a factor showing that Cargill's denial of knowledge of the $150,000 bribe was false, as charged in Count One. (See p. 4, *supra.*)

The government did not limit its use of Carroll's testimony to the first two counts. In its summation, *the government relied upon the very same portion of Carroll's testimony in support of Count One and of Count Three.* Referring to Count One (which charged the false denial of knowledge of the $150,000 bribe), the prosecutor stated:

> "What is the pertinent testimony?
>
> Carroll at that time in March of 1958, explained to this defendant in detail all about the bribe.
>
> What was the defendant's first remark when he learned of this sum of $150,000 being paid to Judge Corn by way of a bribe? 'I wish I had known about it. I could have gotten it for less.'
>
> My, my, my. Do you know what? The defendant on that one occasion was telling the truth. He could have gotten it for less because on other occasions he had." (R. 1286-87.)

[4] The government claimed in support of Count Three that Cargill had four "financial transactions" with Justice Corn (R. 1291). But there is no way of ascertaining which one or ones the jury found—or whether it would have believed any beyond a reasonable doubt had one been disproved.

Referring to Count Three (which charged false denial of "any financial transactions with any Justices of the Oklahoma Supreme Court"), the prosecutor stated:

> "One remark of the defendant which is very significant, and *which alone establishes that he has had financial transactions with members of the Oklahoma Supreme Court,* is reflected in his initial response to Hugh Carroll when he first learned that this astronomical sum of $150,000.00 had been paid: 'I wish I'd a known about it, I could have handled it for a lot less.' Would a statement like that be made by a man who in fact had not handled it for a lot less?" (R. 1294; emphasis supplied.)

It might be argued that the prejudice on Counts One and Two was even greater than on Count Three. But it seems difficult to suggest a reasonable test under which the error would be deemed not harmless as to the first two counts but harmless as to Count Three—the count where assertedly Carroll's testimony "alone establishes" the charge. At all events, if there is such a test, it should be applied pursuant to a ruling by this Court defining the standard of harmless error under *Dennis* v. *United States.*

2. At least since *In Re Oliver,* 333 U.S. 257 (1948), the closest American counterpart to Star Chamber examinations has been the examination of a prospective defendant subpoenaed to appear before the grand jury.[5] The prospective defendant is interrogated by

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[5] The *in camera* examination by a fire marshal of arson suspects in *Re Groban,* 352 U.S. 330 (1957), was upheld by a 5 to 4 majority on the rationale that the examination's purpose was not criminal prosecution. The grand jury's purpose of course is criminal prosecution and its inquiry is not limited to any specific type of crime. Two of the *Groban* majority expressly noted that it did not follow from their decision "that secret inquisitorial powers

one or a battery of prosecuting attorneys, in secret and in the absence of counsel. See Rule 6(e), F.R. Crim. P. Like the defendant before the Star Chamber, he is sworn to tell the truth while his interrogators seek to exact testimony that can form the basis for charges against him. See 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 342-44 (Franklin ed.); Silving, *The Oath,* 68 YALE L.J. 1329, 1366-67 and n. 243 (1959). Unlike the Star Chamber defendant, however, the prospective defendant before the grand jury may be unaware that he is the subject of the investigation, at least where as here the prosecuting attorney does not advise him of his status or his rights.

This Court has never passed upon the issue of whether a prospective defendant may be subpoenaed before the grand jury. Nor has it passed upon the subsidiary issue of whether, if the prospective defendant may be subpoenaed, he must be advised of his status as a prospective defendant and/or his privilege against self-incrimination and right to counsel.

The practice of subpoenaing a prospective defendant before a federal grand jury is a recurrent one, and the problems that it raises have become particularly acute in light of *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), and *Miranda* v. *Arizona,* 384 U.S. 436 (1966). The right to counsel which *Escobedo* and *Miranda* confer upon a suspect under interrogation comes in direct conflict with the provisions of Rule 6(e), F.R.Crim. P., which exclude any non-government counsel from the grand jury room. The conflict which would arise

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given to a District Attorney would also have to be sustained." *Id.* at 337 (concurring opinion of Justices Frankfurter and Harlan). The instant situation presents the issue of whether such powers should be sustained, where the prosecutor subpoenas a suspect before a federal grand jury.

between *Escobedo-Miranda* rights and Rule 6(e) restrictions *if* a prospective defendant may be subpoenaed by the government as a grand jury witness, raises a substantial question as to whether this Court should prohibit the subpoenaing of a prospective defendant, or alternatively should amend Rule 6(e) to permit the presence of his counsel.[6]

The potential for abuse in secret interrogation of the prospective defendant was heightened here by the imposition upon petitioner of an invalid oath of secrecy. At trial the Justice Department Special Attorney who had conducted the grand jury investigation identified the oath administered to petitioner before the grand jury, an oath that:

> "You do solemnly swear that the testimony you give before this Grand Jury will be the truth, the whole truth and nothing but the truth; and further you do solemnly swear that you will keep secret and will not divulge anything that transpires in the Grand Jury Room unless directed to do so by a Court of competent jurisdiction, so help you God." (R. 326, 1419.)

This oath is in direct conflict with the rule promulgated by this Court, Rule 6(e), F.R.Crim.P., which prescribes secrecy for the grand jurors, government attorneys and stenographers, but imposes no obligation

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[6] While dicta in the dissenting opinion in *Re Groban, supra,* 352 U.S. at 346-47, might afford a basis for arguing that present practice does not offend the minimal guarantees of due process, the practice should be reevaluated in light of the specific Fifth and Sixth Amendment guarantees recognized by *Miranda and Escobedo* and the greater guarantees that this Court may prescribe in the exercise of its rule-making and supervisory powers over the grand jury procedures of the federal district courts.

of secrecy upon witnesses. Rule 6(e) expressly provides:

> "No obligation of secrecy may be imposed upon any person except in accordance with this rule."

The use of this flagrantly illegal oath in a grand jury investigation being conducted by Justice Department attorneys, rather than by a local U.S. Attorney, suggests that the use of the illegal oath may be a widespread practice, upon which this Court should pronounce. What form of oath federal grand juries generally use is not readily ascertainable,[7] since grand jury minutes typically record merely that the witness was "duly sworn". Thus the grand jury minutes of petitioner's testimony state that he was "duly sworn" (R. 1410), although the oath proven by the government at trial (R. 326) diametrically contradicts the minutes' statement. It is questionable whether the government, having subpoenaed petitioner before the grand jury and imposed a partially invalid oath upon him, should be permitted to indict him for perjury in allegedly violating one part of the oath. *Cf. Bowman Dairy Co. v. United States,* 341 U.S. 214 (1951), holding that the inclusion of an invalid portion in a subpoena vitiates a prosecution for contempt for violating the valid part of the subpoena. But even if the oath of secrecy would not in itself vitiate the indictment, the Court may consider it as an aggravating factor in the practice of subpoenaing prospective defendants.

The weight of lower court authority appears to permit the subpoenaing of a prospective defendant before

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[7] Petitioner suggests that the government, which should be privy to this information, be directed to furnish it to the Court and counsel.

a grand jury, so that the practice will presumably continue unless abated by this Court. In the Second Circuit, a long line of cases has sustained the legality of subpoenaing of a prospective defendant,[8] although the Court noted in the first of these cases:

> "Indeed, one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a Grand Jury any person who is *de jure* or *de facto* an accused." *United States* v. *Scully*, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955).

In 1955 the Court of Appeals for the District of Columbia Circuit stated:

> "No doubt it would be a boon to prosecutors if they could summon before a Grand Jury a person against whom an indictment is being sought and there interrogate him, isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public. But there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure." *Powell* v. *United States*, 226 F.2d 269, 274 (D.C. Cir. 1955).

In *Jones* v. *United States*, 342 F.2d 863 (D.C. Cir. 1964), an eleven judge court sitting en banc divided three ways upon the issue left open by *Powell*. The plurality opinion of five judges upheld the validity of subpoenaing a prospective defendant before the grand jury. Four members of the court held that the practice is always improper, while two held that it was im-

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[8] The line of Second Circuit authorities is collected and followed in *United States* v. *Winter*, 348 F.2d 204, 207 and n. 6 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965), upon which case the court below relied (App. 9a).

proper under the particular circumstances before the court.

On the other hand, an indictment was held invalid because of the subpoenaing of the prospective defendant in *United States* v. *Di Grazia*, 213 F.Supp. 232 (N.D. Ill. 1963). Recently, in *Walter Sheridan, et al.* v. *Jim Garrison, et al.*, 36 U.S. LAW WEEK 2175 (E.D. La., Aug. 28, 1967), a federal district court enjoined enforcement of a subpoena that would have required a prospective defendant to appear before a state grand jury which was inquiring into an alleged plot to assassinate President Kennedy. In a carefully considered opinion, the Court held that the compelled appearance would violate Sheridan's federal constitutional rights under *Escobedo* and *Miranda*. If a prospective defendant, aware of his status as such, thus has a federal constitutional right to enjoin compliance with a state grand jury subpoena, the federal constitutional right should be no less in federal grand jury proceedings. The government's failure to advise petitioner of his status as a prospective defendant should hardly lessen petitioner's constitutional right not to appear before the grand jury, or enable the government to prosecute him through its violation.

Nor is it any answer to say, as the court below held, that the issue does not arise because petitioner was indicted for perjury, instead of being indicted for the illegal conduct which he denied. (See App. 9a.) When petitioner appeared before the grand jury, that body had already heard the testimony of Carroll implicating petitioner. Had petitioner given what the prosecution contended were truthful answers, petitioner faced indictment for conspiring with Carroll and others to obstruct justice or suborn perjury

in Carroll's federal bankruptcy court proceeding. If this Court should hold that the government may not secure a valid indictment for criminal conduct by compelling the appearance of the prospective defendant before the grand jury, the government ought not to be able to obtain the same result by the artifice of indicting the suspect for allegedly perjurious denial of the suspected conduct.[9] Compare the cases which have held that an indictment will not lie under the false statement statute, 18 U.S.C. § 1001, for exculpatory denials by a suspect under government agents' interrogation. *Paternostro* v. *United States,* 311 F.2d 298 (5th Cir. 1962) (collecting authorities).

As appears from the foregoing discussion, the whole area is permeated with problems concerning the rights of a prospective defendant before the grand jury which have not been passed upon by this Court. Certiorari is appropriate here on the same rationale noted in *Hoffman* v. *United States,* 341 U.S. 479, 485 (1951), that increasing litigation concerning the Fifth Amendment rights of witnesses in grand jury investigations shows the need for review by this Court to restrain "any abuses of the investigatory power invoked" and to preserve the grand jury's function "'not only to examine into the commission of crimes but to stand between the prosecutor and the accused.'" Review in this sensitive area is necessary not only as a matter of constitutional adjudication but in the exercise of this Court's supervisory powers over the functioning of the grand juries of the district courts.

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[9] In *United States* v. *Winter, supra,* the government elected to try Winter for perjurious denial of the offense of bribery, instead of trying him on the bribery indictment. See 348 F.2d at 206.

3. The Court of Appeals for the First Circuit, in *Delaney* v. *United States,* 199 F.2d 107 (1st Cir. 1952), established that a federal criminal defendant is entitled to a continuance where the federal legislative branch, acting in good faith, has held public proceedings "inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment". *Id.* at 114. In the instant case, the government contended that the *Delaney* rule was inapplicable because the publicity arose from the State rather than the federal Legislature. (R. 60-61.) *Cf. Sheppard* v. *Maxwell,* 384 U.S. 333, 354, n. 1 (1966), citing *Delaney* as authority that the trial judge should have continued the trial date until after pending local elections to assure a fair trial.

In recent years, and particularly since the inception of the "Organized Crime Drive", federal criminal jurisdiction has increasingly been asserted over cases of great public concern to the States or their political subdivisions, and generally involving concomitant violations of state law. A prime example is federal prosecutions for failure to pay income tax on bribes allegedly received by state or local government officials. In these circumstances, the existence of legitimate inquiries by state or local legislative bodies, generating publicity which (absent a continuance) would prejudice trial of a federal criminal indictment, is likely to occur far more frequently than the *Delaney* dilemma of concomitant federal legislative and criminal proceedings. The applicability of the *Delaney* rule to publicity generated by state legislative proceedings should therefore be resolved by this Court.

In the instant case, moreover, the original source of the prejudicial publicity in the state legislative forum

was the statement of a prospective government witness to the federal prosecutor. Notwithstanding the prosecutor's assertion that he did not furnish the statement to a member of the State Legislature (R. 67-68), since the statement was one obtained at a federal penal institution by a federal prosecutor (see R. 1464), the federal government must bear some responsibility for the pretrial disclosure of the statement. The standards to be observed by federal prosecuting officials in this respect, and the extent, if any, to which federal involvement in the generation of the prejudicial publicity in the state forum must be shown in order to invoke the *Delaney* rule, are important subsidiary questions which should be resolved by this Court.

## CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

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November 6, 1967

was the statement of a prospective government witness to the federal prosecutor. Notwithstanding the petitioner's assertion that he did not furnish the statement to a member of the State Legislature (R. 67-68), since the statement was one obtained at a federal penal institution by a federal prosecutor (see R. 114-5), the federal government must bear some responsibility for the pretrial disclosure of the statement. The standards to be observed by federal prosecuting officials in this respect, and the extent, if any, to which federal involvement in the generation of the prejudicial publicity in the state forum must be shown in order to invoke the *Delaney* rule, are important subsidiary questions which should be resolved by this Court.

## CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 6, 1967

# APPENDIX

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 8566 — August 1967 Term

O. A. CARGILL, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From The United States District Court
For The Western District of Oklahoma.

**Opinion**

Leslie L. Conner, Oklahoma City, Okla. (James M. Little, Leslie L. Conner, Jr., O. A. Cargill, Jr., and David Cargill, Oklahoma City, Okla., with him on the Brief), for Appellant.

David A. Kline, First Assistant United States Attorney (B. Andrew Potter, United States Attorney, with him on the Brief), for Appellee.

Before LEWIS, BREITENSTEIN and SETH, Circuit Judges.

SETH, Circuit Judge.

Appellant was indicted on three counts for perjury, was convicted by a jury, and takes this appeal. The charges stemmed from his answers to questions asked during his appearance before a federal grand jury in 1964. In Count I the questions concerned his knowledge of $150,000 withdrawn from Selected Investments Corporation by a Hugh A. Carroll; in Count II his knowledge of a person named "Pierre Laval" or of a story about him; and in Count III appellant is charged with falsely denying having any financial transactions with Justices of the Oklahoma Supreme Court.

Considering Counts I and II above, it appears from the record that the strongest evidence against appellant was the testimony of witnesses Carroll and N. S. Corn. Carroll was a former officer of Selected Investments Corporation, and Corn a former Justice, or supernumerary, of the Oklahoma Supreme Court. The testimony of Carroll during trial was that appellant Cargill had fabricated the "Pierre Laval story" to explain the disposition of the $150,000 withdrawn from Selected Investments actually used to "pay" certain justices for a favorable decision from the Oklahoma Supreme Court. Appellant represented witness Carroll in the Selected Investments bankruptcy proceedings in March 1958, where Carroll testified regarding the $150,000 and Pierre Laval. Witness Corn testified during the trial below as to financial transactions that he had had with appellant.

It appears that witness Carroll decided to "tell the truth" a day or so before he, Carroll, appeared before the federal grand jury investigating income tax law violations. Carroll appeared before the grand jury on April 6, 1964, a day before appellant appeared. Carroll was granted immunity from further federal or state prosecutions before he testified to the grand jury.

In December 1964, some eight months after appellant appeared before the grand jury, witness Corn, who was then serving a federal sentence, made a lengthy deposition implicating appellant in the Oklahoma Supreme Court bribery scandal and asserting appellant's financial dealings with justices of the court. It appears that Corn, who had pleaded nolo contendere to a charge of income tax evasion, was also granted immunity from further federal or state prosecution.

The federal grand jury which indicted appellant met again in February 1965, some nine or ten months after appellant's last appearance before the grand jury, and about one or two months after Corn made his deposition.

The appellant urges, among other things, that he was improperly denied by the trial court the transcripts of the grand jury testimony of the witness, Hugh A. Carroll, which he requested for cross-examination of the witness, and we should reverse on Counts I and II for this reason.

The record shows on this issue that appellant prior to his trial below, and pursuant to rule 6(e) of the Federal Rules of Criminal Procedure, moved for the production of a copy of his own testimony, and also the testimony of Hugh A. Carroll and others, given before the grand jury. The trial court granted this motion only as to appellant's own testimony. A motion was also made before trial under the Jencks Act for the production of certain statements.

Appellant during the course of his trial, and more particularly after the direct examination of the principal witness for the United States, Hugh A. Carroll, and before his cross-examination, made a request for the production of certain documents, transcripts, and statements. Appellant's attorney then asked whether the District Attorney "has any statements or copies of statements from this witness at any time so that we may examine them for the purpose of cross-examining this witness?" Thereafter, and still before cross-examination, there was an extended discussion of the type of statements sought by the appellant, and a request was then made for a transcript of the testimony of the witness before the grand jury ". . . concerning the matters he has testified to here, before the grand jury on, I believe, April 6, 1964, which certainly we would not have access to." This request referred to the witness Carroll, and a subsequent request was made specifically for the grand jury testimony of this witness. The United States Attorney stated that the grand jury testimony was "not producible under 3,500 . . . ." The court responded, "I'll sustain an objection as to the grand jury testimony at this time . . . ." Discussion was had as to transscripts of other proceedings had in open court.

The appellant then again requested the grand jury transcript of the testimony of the witness, and the court again sustained the objection of the Government to its production. The attorney for the appellant asked that the court examine the testimony of the witness Carroll given before the grand jury, and the court did so. The cross-examination of Carroll then proceeded at some length. At its conclusion, and after redirect and recross-examination, and after a discussion of other issues with the jury excused, the court said:

> "I might say to you, gentlemen, with respect to this matter of the grand jury transcript that was requested yesterday, that I examined the pages of it ahead of the testimony of the defendant, Mr. Cargill, first hundred and seventy some odd pages of it, and I did that last night, and there's no occasion for changing any ruling based upon that that I know of, because there's no reference to anything other than income tax violations."

From the requests made by the attorney for the appellant, it appears that it began as a request for Jencks-type statements for the purpose of cross-examining the witness Carroll, and was later during the course of the discussions among the attorneys and with the court expanded to include a specific request for the grand jury transcript of witness Carroll's testimony for the same purpose.

From its statement and the action taken by the trial court, it appears that the court understood the purpose of the request to be for the grand jury testimony to cross-examine Carroll. The ruling of the trial court was in June 1965 which was about a year before the Supreme Court's decision in Dennis v. United States, 384 U.S. 855 (June 20, 1966), which considered the production of grand jury testimony of witnesses. The appellant urges that the

trial court's ruling was reversible error under Dennis and otherwise.

The Supreme Court opinion in Dennis begins with a reference to the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts," citing United States v. Procter & Gamble Co., 356 U.S. 677, and notes further that when the disclosure is made, "it will be done discretely and limitedly." The opinion continues with a reference to rule 6(e) of the Federal Rules of Criminal Procedure and states that disclosure is proper after the jury's functions are ended. The Court retains the requirement that "particularized need" be shown in order that the secrecy may be lifted, but holds *in effect* that such need is shown when the defense states that it wishes to use the transcript for the purpose of impeaching a witness, to refresh his recollection, or to test his credibility. Thus the Court as far as cross-examination is concerned has removed most, if not all, of the substance from the particularized need requirement, although it has retained the term. Under this opinion, it appears that the defense is entitled to the grand jury transcript of the witness's testimony when the jury's functions are ended, and when the request is made during the course of trial that it is necessary for the purpose of cross-examining such witness for the above mentioned purposes. The Supreme Court mentions and relies to some extent on the rationale of Jencks v. United States, 353 U.S. 657, on this point. The Court also states that ". . . it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations . . . ."

Under the record in the case before us, as to Counts I and II, the appellant has brought himself within the Supreme Court's decision in Dennis v. United States, supra, as to his trial request for the transcript of the testimony

of Carroll. We hold that it was error for the court not to have complied with the request.

It is recognized that the Court in Dennis had before it an extreme case in view of the long delay which occurred between the witness's grand jury testimony and his court appearance, while here the delay is some fourteen months. However, the reasoning of the Court in Dennis is applicable despite the difference in the facts and we are bound by it.

The record shows that the trial court considered the request for the testimony in June 1965, during the course of the trial. Our opinion in the second Dennis case, 346 F.2d 11, was dated April 26, 1965, and the Supreme Court opinion reversing is dated June 20, 1966. Thus the trial court did not have the benefit of the Supreme Court's opinion when it acted.

There is created under Dennis a division of duties among the trial judge, the attorney for the defense, and the attorney for the Government. The trial court still has the duty and may be limited as follows, quoting from Dennis:

> "The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process: for example, to cause the elimination of extraneous matter and to rule upon applications by the Government for protective orders in unusual situations, such as those involving the Nation's security or clearcut dangers to individuals who are identified by the testimony produced . . . ."

Thus in the case at bar the attorney for the defendant made a proper and specific request for a transcript of the witness's grand jury testimony to be used in his cross-examination, and under Dennis it should have been furnished to him absent only a motion for a protective order.

In the event of "unusual situations," a protective order is sought, the trial court must examine in camera the testimony sought to be "eliminated," and if an order is entered the material must be preserved for consideration in the event of an appeal. It is however the duty of the attorneys for the Government to be alert for the need for such protective orders when requests for transcripts are made. This is not the responsibility of the trial judges under the Dennis decision. The Supreme Court so refers to protective orders in "unusual situations" as where the Nation's security is involved or where there is presented clearcut danger to individuals who are identified by the testimony.

The case before us concerns a specific and clear request for a transcript of a named witness' grand jury testimony needed for his cross-examination, and we decide that it should have been produced for such a purpose. The cases developing the rule announced in Dennis concern the use of testimony in cross-examination to impeach a witness, to refresh his recollection, or to test his credibility. In Dennis the transcripts were sought for such purposes, and we consider that the opinion is implicitly so limited. The Second Circuit in United States v. Youngblood, F.2 (June 21, 1967), has considered the issues here present, and laid down a somewhat broader rule.

The appellant also made several pretrial motions seeking the production of the grand jury testimony of several witnesses, including the witness Carroll. This was denied several months before the trial, and a second request was denied immediately before the trial. These requests were in most general terms and would have required a broad pretrial disclosure of the testimony of many of the witnesses. The request was based only on the assertion of the appellant that such disclosure would serve the ends of justice or aid in the preparation for trial. These requests were much too broad and do not come within the Dennis rule.

Count III of the indictment charges that the appellant falsely denied ever having had ". . . any financial transactions with any justices of the Oklahoma Supreme Court." The appeal on this point does not involve the production of transcripts of testimony given before the grand jury considered above. Instead the appellant, in addition to the asserted errors relating to all the charges, urges that there was insufficient evidence to prove the charge under the rules pertaining to perjury.

We held in Doty v. United States, 261 F.2d 10 (10th Cir.), that guilt of perjury must be established by the testimony of two independent witnesses or by one witness and corroborating evidence which is inconsistent with the accused's innocence. See also Weiler v. United States, 323 U.S. 606. The record before us shows that the facts pertaining to financial transactions were testified to by the witness Corn with reference to money received in a certain case. The witness Marshall testified that he paid appellant a sum of money, and that appellant said the witness would lose the case if he ". . . didn't take care of the boys on the hill." There was also evidence that the sum paid by Marshall was provided by a third person and was receipted for by appellant as a fee. Appellant was not counsel of record in the case concerned, and another attorney testified that he handled the case by himself in the trial court and in the Oklahoma Supreme Court.

The record shows that there was sufficient evidence provided to the jury in accordance with the "two witness" rule. The appellant urges that the testimony was by accomplices and does not constitute corroboration. We however held to the contrary in Doty v. United States, 261 F.2d 10, which also arose in Oklahoma.

The record contains substantial evidence as to Count III, and we find no error on the issue here considered.

Appellant also urges several errors and grounds for reversal which go to all the counts. Among these, the

appellant urges that the grand jury proceedings had reached a point where they were accusatory as to him; and thus he should have been warned of his constitutional rights. However the fact that the charge was perjury is a sufficient answer to this contention together with the case of United States v. Winter, 348 F.2d 204 (2d Cir.). It is apparent that the accused was facing a dilemma, but there was nothing to prevent him from asserting his rights. Appellant is a practicing attorney of many, many years' experience and was certainly well aware of his right to remain silent. Kitchell v. United States, 354 F.2d 715 (1st Cir.).

We find no basis for the assertion that appellant was denied a fair trial because the trial judge did not recuse himself. The record shows that the judge conducted the proceedings firmly and impartially. Likewise we find no error in the selection of the jury nor in the conduct of the attorneys for the Government.

The grand jury was investigating matters well within its jurisdiction, and the charge here concerned arose out of these proceedings.

The trial court acted properly in overruling appellant's motion for a verdict of acquittal, as there was adequate evidence then before the jury.

Also we find no error in the manner in which the trial court handled the asserted separation of the jurors.

The trial court instructed on good character in conformance with Johnson v. United States, 296 F.2d 72 (10th Cir.), and Oertle v. United States, 370 F.2d 719 (10th Cir.), and we find no error.

The conviction and judgment on Counts 1 and 2 are set aside for the reasons above stated. The judgment and conviction on Count 3 are AFFIRMED.

**Judgment of the Court of Appeals**

Twenty-Second Day, July Term, Friday, August 11th, 1967

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the conviction and judgment on Counts 1 and 2 are set aside for the reasons stated in the opinion of the court, and the judgment and conviction on Count 3 are affirmed.

It is further ordered by this court that O. A. Cargill, appellant, surrender himself to the custody of the United States Marshall for the Western District of Oklahoma, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

**Order Denying Rehearing**

Thirty-Eighth Day, July Term, Thursday, Sept. 7th, 1967

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.